

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

**SUPERIOR COURT
CRIMINAL ACTION
NO. 2005-00109**

COMMONWEALTH

vs.

CHRISTOPHER M. McCOWEN

**MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S
MOTION FOR RECONSIDERATION OF JUROR MISCONDUCT MOTION**

Christopher M. McCowen, the defendant, was convicted after a jury trial in November, 2006 of first degree murder, aggravated rape, and aggravated burglary. Shortly after his conviction, the defendant filed a motion for new trial, styled as a motion for post-verdict inquiry of jurors regarding purported misconduct. In 2008, the court held an evidentiary hearing where the deliberating and alternate jurors testified on two issues: racial bias, and inappropriate pre-verdict communication between alternate and deliberating jurors.¹ On April 4, 2008, the court issued a comprehensive forty-page decision denying the motion and finding no violation of the defendant's right to an impartial jury on either basis. In 2017, a national news program aired a television special and podcast regarding the defendant's trial and conviction, containing statements by the single alternate juror. The defendant then filed the instant motion, arguing that the alternate juror's public statements showed that he had impermissibly participated in jury deliberations, despite denying such conduct during the 2008 evidentiary hearing. For the following reasons, the defendant's motion for reconsideration is **DENIED**.

¹ The motion was heard by Justice Gary A. Nickerson, who was also the trial judge. Due to Justice Nickerson's July 25, 2018 retirement, the instant motion was heard by this jurist in his capacity as Regional Administrative Justice for Barnstable, Dukes, and Nantucket Counties.

BACKGROUND

The defendant's trial, for the rape and murder of Christa Worthington, was held in October and November, 2006. After the charge, twelve jurors were selected for deliberation, and two were selected as alternates. Deliberations began, but were halted when one deliberating juror was dismissed by the court for misconduct.² The dismissed juror was replaced with one of two alternate jurors, leaving a single alternate, Robert Lyon ("Alternate Juror Lyon"). The newly constituted jury then deliberated until reaching a verdict of guilty on November 16, 2006.

In the weeks after the verdict, defense counsel was contacted by several jurors, including the juror who had been dismissed for misconduct. These jurors expressed concern about several incidents during jury deliberations, and the appropriateness of the guilty verdict. On December 12, 2006, the defendant filed a motion for new trial, styled as a motion under *Commonwealth v. Fidler*, 377 Mass. 192 (1979), for post-verdict inquiry of jurors regarding purported extraneous influences on the jury deliberations. The defendant's motion alleged violation of his right to an impartial jury due to several sources of extraneous influence, including, *inter alia*, racial bias or commentary by several jurors and inappropriate discussion of the case with alternate jurors.

In January and February, 2008, the trial judge held an evidentiary hearing on the limited issues of racial bias and alternate juror deliberation.³ During this hearing, the trial judge questioned ten of the twelve deliberating jurors, the juror dismissed for misconduct, and Alternate Juror Lyon, regarding any communications by alternates with deliberating jurors prior

² The juror's misconduct was unrelated to the defendant's allegations of racial bias and alternate juror deliberation. The juror was found to have lied to police, and thereby to have misled the court, as to her relationship with a man who was arrested in her home during a weekend break in the deliberations. The man was actually her live-in boyfriend.

³ The defendant's motion for reconsideration does not raise any new evidence or arguments as to the allegation of racial bias amongst the deliberating jurors. Therefore, the trial judge's thorough and thoughtful examination of alleged racial bias in 2008 stands unchallenged, and the issue will not be further considered here.

to the verdict.⁴ Defense counsel requested that direct examination include “whether or not [Alternate Juror Lyon] discussed the deliberations going on in the jury room with anyone during jury deliberations.” (Hearing Transcript p. 228, line 2-4). However, the trial judge noted that “[w]hat the deliberating jurors may have spoken to the alternate during a break is irrelevant,” and limited his questioning to the only issue relevant to the defendant’s extraneous influence claim: “if the alternate’s two cents so-to-speak has come into that jury room during deliberations in any fashion.” (Hearing Transcript p. 226, lines 4-8).

The ten deliberating jurors who testified were unanimous that Alternate Juror Lyon had not discussed his own analysis of the evidence with them during deliberations.⁵ Alternate Juror Lyon also denied doing so, testifying as follows:

Q: Did you ever go in to deliberate in the jury room?
A: No.
Q: You remained as an alternate throughout the matter?
A: Yes.
Q: At any time from the moment you were selected as an alternate until that verdict was announced, did you discuss your view about the case with your fellow jurors?
A: No.
Q: At any time did you send any message into that jury room about how you felt about the case?
A: No.

(Hearing Transcript p. 227, lines 8-19). The trial judge credited this testimony and found that Alternate Juror Lyon did not introduce his own, extraneous views on the evidence to the deliberating jury. On this basis, the trial judge concluded that the defendant had failed to meet his initial burden to show, by a preponderance of evidence, that the jury was exposed to

⁴ Two of the twelve deliberating jurors were excused from testifying at the evidentiary hearing for health and travel concerns. Defense counsel did not object to this excusal.

⁵ Prior to the evidentiary hearing, three jurors, including the juror dismissed for misconduct, submitted affidavits raising the prospect that the deliberating jurors discussed their progress with Alternate Juror Lyon. None of these affidavits represented that Alternate Juror Lyon expressed his own views to the deliberating jurors during these exchanges.

extraneous information which could have deprived him of his constitutional right to an impartial jury. The defendant did not challenge this finding in his subsequent direct appeal to the Supreme Judicial Court, which upheld the convictions.

In 2017, ABC News aired a six-part podcast and a “20/20” television special called “A Killing on the Cape,” purporting to investigate the defendant’s conviction for the Worthington murder. The programs contained interviews with many individuals who were involved in Worthington’s life and/or were connected to the defendant’s trial. One such individual was Alternate Juror Lyon.

In September, 2018, the defendant moved for reconsideration of the trial judge’s denial of the 2006 *Fidler* motion. In support, the defendant submitted electronic recordings of the podcast and television special, accompanied by defense counsel’s affidavit characterizing statements made by Alternate Juror Lyon as “explicitly [telling] ABC News that he participated in the deliberation process.”⁶ Carelessly, the defendant’s motion failed to quote specific statements by Alternate Juror Lyon, note the time points within the recordings where these statements were made, or include a transcript of the podcast and/or television special, leaving this court to speculate as to the exact statements which formed the basis for defense counsel’s affidavit.

A review of the electronic recordings provided by the defendant reveals the following statements by Alternate Juror Lyon which reference jury deliberations.⁷ In the “20/20” television special, Alternate Juror Lyon asserts that “Race did not play a part at all in deciding McCowen’s guilt. It had no effect on the verdict. There’s just no way around the DNA.” (20/20 1:23). In

⁶ The defendant has not raised any arguments as to the existence or relevance of any further unaired footage or recording of Alternate Juror Lyon in the possession of ABC News.

⁷ For citations to Alternate Juror Lyon’s statements within the electronic recordings, the court adopts the Commonwealth’s report of time stamps for the recordings as present on the “flash drive” submitted by the defendant.

Episode 5 of the podcast, Alternate Juror Lyon is heard making several relevant statements.⁸ Describing crime scene photographs submitted to the jury, he states he thought “those photos helped us get to the reality of the crime, to get to the reality of a murder was committed.” (Ep. 5, 8:50). He later states “Race did not play a part at all in deciding McCowen’s guilt or innocence. It had no effect on the verdict.” (Ep. 5, 41:12). Lastly, he asserts his belief in the defendant’s guilt in a manner that arguably references the deliberating jury’s verdict:

“Christopher McCowen is the man who committed the murder. There is absolutely no evidence that anyone else did it. The trial was ten years ago and time has not altered, at all, my conviction about his guilt. I still believe as strongly as I did then that he was the man who committed the crime.”

(Ep. 5, 43:59).

The defendant requests a hearing on the motion, but does not specify the nature of any such hearing, or topics to be addressed there. The court presumes that the purpose of the proposed hearing would be to seek further testimony from Alternate Juror Lyon regarding any participation he may have had in the jury’s deliberations.

DISCUSSION

The matter is before this court on the defendant’s motion for reconsideration of the trial judge’s denial of his prior motion for a new trial, on the grounds that Alternate Juror Lyon’s recent public statements contradict his sworn testimony in the 2008 evidentiary hearing and establish that the jury was not impartial due to the extraneous participation by Alternate Juror Lyon in the deliberations. “The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done.” Mass. R. Crim. P. 30(b), as appearing in

⁸ There are several statements by Alternate Juror Lyon during Episode 5 which do not relate to jury deliberation, and thus will not be discussed in detail. In short, these statements describe Alternate Juror Lyons’s experience and view of various evidence presented at trial, and express his personal opinion of the prosecutor and defense counsel. (See Ep. 5, 8:39, 11:00, 41:29, 43:59).

435 Mass. 1501 (2001). The court may base its decision entirely on the motion and accompanying exhibits, unless it determines that a substantial question was raised by the submissions which requires an evidentiary hearing. Mass. R. Crim. P. 30(c)(3); *Commonwealth v. Stewart*, 383 Mass. 253, 259-260 (1981). “In determining whether a substantial issue meriting an evidentiary hearing under rule 30 has been raised, we look not only at the seriousness of the issue asserted, but also to the adequacy of the defendant’s showing on the issue raised.” *Stewart*, 383 Mass. at 257-258 (internal quotations omitted).

“The Sixth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights guarantee a criminal defendant the right to a trial by an impartial jury.” *Commonwealth v. Guisti*, 434 Mass. 245, 251 (2001). “The presence of even one juror who is not impartial violates a defendant’s right to trial by an impartial jury.” *Commonwealth v. Long*, 419 Mass. 790, 802 (1995). A juror’s impartiality may be affected by exposure to “extraneous” matters, defined as matters “that involve[] information not part of the evidence at trial ‘and raise[] a serious question of possible prejudice.’” *Guisti*, 434 Mass. at 251, quoting *Commonwealth v. Kater*, 432 Mass. 404, 414 (2000).

A court may initiate a post-verdict interview of some or all jurors “if the court finds some suggestion that there were extraneous matters in the jury’s deliberations.”⁹ *Commonwealth v. Fidler*, 377 Mass. 192, 203 (1979). “Counsel, litigants and the courts should remember that ‘(h)istorically, interrogations of jurors have not been favored by federal courts except where

⁹ In *Commonwealth v. Moore*, the Supreme Judicial Court overruled portions of *Fidler*, which “prohibited attorney-initiated, postverdict contact of and communications with jurors free from court oversight.” *Moore*, 474 Mass. 541, 547 (2016). However, the changes articulated in *Moore* only apply to “attorneys in their representation of litigants in trials on or after July 1, 2015,” as well as attorneys who represent “a party in a case that was tried to a jury and concluded before that date . . . if the case was pending on appeal as of July 1, 2015, or the appeal period had not run as of that date.” *Id.* at 553-554. The defendant’s case was not under appeal, nor within the appeal period, on July 1, 2015. Accordingly, none of the changes articulated in *Moore*, which permit limited attorney-initiated contact with future jurors, apply to the defense counsel here. The *Fidler* paradigm remains the law of this case.

there is some Showing [sic] of illegal or prejudicial intrusion into the jury process.”” *Id.*, quoting *United States v. Riley*, 544 F.2d 237, 242 (5th Cir. 1976), cert. denied 430 U.S. 932 (1977). Even if the defendant has made such a showing, the court’s juror interviews must nevertheless adhere to “the common-law principle barring inquiry into the contents of jury deliberations and thought processes of jurors and the impeachment of jury verdicts based on information that might be gained from such inquiry.” *Moore*, 474 Mass. at 548, citing *Fidler*, 377 Mass. at 196-198.

Whatever the source of the defendant’s evidence of extraneous influence, whether produced in an evidentiary hearing or not, the court must evaluate the defendant’s motion for new trial due on that basis under the two-phase analysis set out in *Fidler* and its progeny. *Commonwealth v. Kincaid*, 444 Mass. 381, 386-387 (2005). First, the defendant bears the burden of showing, by a preponderance of the evidence, that the jury was in fact exposed to extraneous matters. *Id.* “If the defendant makes such a showing, as determined by the judge, the burden shifts to the Commonwealth to demonstrate ‘beyond a reasonable doubt’ that the defendant was not prejudiced by the extraneous matters.” *Guisti*, 434 Mass. at 253.

Here, this court finds that the news program recordings submitted by the defendant are insufficient to make a “colorable showing” that Alternate Juror Lyon introduced extraneous matters which may have affected the jury’s impartiality, and do not warrant reconsideration of the trial judge’s decision on the motion for new trial. See *Commonwealth v. Lynch*, 439 Mass. 532, 545, cert. denied 540 U.S. 1059 (2003). While “a judge should exercise discretion in favor of conducting a judicial inquiry” on allegations of extraneous influence upon a jury “[w]here a case is close,” this court finds the inquiry already undertaken in this case in 2008 directly addressed this allegation, and has not been materially undermined by the new evidence submitted

by the defendant as to Alternate Juror Lyon's recent public statements. See *Guisti*, 434 Mass. at 253.

The defendant's motion characterizes Alternate Juror Lyon's statements in the program as "explicitly [telling] ABC News that he participated in the deliberation process," and concludes that Alternate Juror Lyon directly contradicted his sworn denial of participation during the 2008 hearing. However, the court's review of the program statements reveals that the actual statements do not make any direct claims of participation in the deliberations, nor do they plausibly suggest that Alternate Juror Lyon claimed to have influence over the verdict. Instead, the statements could be interpreted to suggest, in an implicit fashion, that Alternate Juror Lyon has actual knowledge of the contents of the jury's deliberations.¹⁰ Further, nothing in the statements compels the conclusion that such knowledge was acquired pre-verdict in contravention of the court's instructions, rather than from post-verdict conversations when the deliberating jurors were at liberty to discuss their experiences with anyone of their choosing.

Regardless of when, if at all, Alternate Juror Lyon acquired information regarding the nature of jury deliberations, there would be no relevance to an evidentiary hearing on the subject. The statements in question implicate, at best, potential communication *from* deliberating jurors *to* an alternate. Informing an alternate of the contents of deliberations cannot cause the deliberating jury to *receive* extraneous influence, and any disregard of the court's instructions prohibiting communication with the alternate during deliberations may not be probed in an attempt to prove grounds for a new trial. See *Fidler*, 377 Mass. at 199 (upholding the court's refusal to interview jurors about alleged disregard of limiting instructions during deliberations because "it must be

¹⁰ It is also reasonable to interpret Alternate Juror Lyon's statements as expressing mere opinion, albeit in overly confident language, on the role of racial bias in the jury's verdict, derived from a fusion of his own view of the evidence presented at trial and his estimation of the character of the deliberating jurors after several weeks of close personal interaction.

presumed that in reaching the verdict, the jurors heeded the judge's instructions. To prove otherwise would require probing the minds of the jurors.").

The court already received testimony in 2008 from Alternate Juror Lyon explicitly refuting the defendant's claim that he deliberated with the jury or transmitted to them his opinion on the case or evidence. Moreover, the trial judge found this denial credible and unanimously corroborated by all of the deliberating jurors interviewed during the hearing. Accordingly, this court finds that the defendant's motion has not raised a credible issue impeaching any of the 2008 testimony, and is not sufficient to require the jurors to endure a rehashing of the same inquiry that was disposed of by the trial judge a decade ago. For those reasons, the defendant's motion for reconsideration of his 2008 motion for new trial, styled as a juror misconduct motion, must be **DENIED** without hearing.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the defendant's Motion for Reconsideration of Juror Misconduct Motion be **DENIED**.



Robert C. Rufo
Justice of the Superior Court

Dated: July 15, 2019